79-889

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No._____

EDUARDO ROMEROS .....PETITIONER

V.

UNITED STATES OF AMERICA .....RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, EDUARDO ROMEROS, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 13, 1979.

OPINIONS BELOW

The Fifth Circuit Court of Appeals rendered opinion in **United States v. EDUARDO ROMEROS**, (No. 78-5733), _____F2d_____, on August 13, 1979. Petition for Rehearing En Banc was denied by order of the Fifth Circuit entered on October 4, 1979. The opinion and and order are appended hereto.

JURISDICTION

This Petition seeks review of judgment entered by the Fifth Circuit Court of Appeals on August 13, 1979, affirming the conviction of Petitioner for criminal conspiracy in violation of 18 U.S.C. § 371. Petition for Rehearing En Banc was denied in the Fifth Circuit by order dated October 4, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conspiracy conviction can stand when there has been a jury determination that the object of the alleged conspiracy does not constitute a federal crime.

2. Whether Government solicited testimony by the sole co-conspirator that he had pled guilty to the same conspiracy count as charged against Petitioner denied the Petitioner a fair trial.

STATUTES INVOLVED

U.S. Constitution amend. XIV, § 1 provides, in pertinent part:

> Section 1 . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
>
> If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment for such misdemeanor.

STATEMENT OF THE CASE

Petitioner was indicted on May 9, 1978, in a three-count indictment. Count One alleged a conspiracy between Petitioner and co-indictee ELISEO SANDOVAL, wherein it was charged that Petitioner and ELISEO SANDOVAL conspired to misapply funds of a Federal Grant, in violation of 18 U.S.C. § 371. Counts II and III charged Petitioner and ELISEO SANDOVAL with substantive violations, wherein it was charged that Petitioner and ELISEO SANDOVAL willfully misapplied specific sums of Six Thousand Five Hundred ($6,500.00) Dollars and Seven Thousand Five Hundred ($7,500.00) Dollars of Government grant funds, in violation 42 U.S.C. § 2971f(a).

The conspiracy count alleged in Count I of the indictment charged that the conspiracy between Petitioner and SANDOVAL began on or about March 31, 1976, and continued "to August 11, 1976". The substantive counts alleged specific dates upon which the alleged misapplications occurred: March 31, 1976 and August 11, 1976.

At the time of the alleged offenses, Petitioner was a Certified Public Accountant who had been hired as

Auditor by the Board of Directors of the Associated City-County Economic Development Corporation (A.C.C.E.D.C.). This Corporation was funded in part by the Community Services Act (C.S.A.), ancillary to the Economic Opportunity Act of 1964. At the time of the alleged offenses, and prior thereto, Petitioner and his accounting firm were conducting on-going audits of several programs under the auspices of A.C.C.E.D.C., some of which he had contracted to audit in the year 1975. ELISEO SANDOVAL was, at the time of the alleged offenses, the Executive Director of A.C.C.E.D.C.

On March 31, 1976, Petitioner received and cashed a check in the amount of $6,500.00. On August 11, 1976, Petitioner received and cashed a check in the amount of $7,500.00. Both of these checks were drawn on a checking account of A.C.C.E.D.C. The Government's theory of prosecution was that these monies were fraudulently obtained by Petitioner, in collusion with ELISEO SANDOVAL.

Petitioner's sole defensive theory was that these monies had in fact already been earned by him through on-going audits and constituted work-in-progress advances. A.C.C.E.D.C. carried the advances on the Corporation's books as an account receivable but did not offset the amounts received by Petitioner from subsequent billings. Petitioner stipulated that the checks had in fact been cashed. Petitioner called five employee-accountant witnesses who testified in substance that the monies received by way of the advances had in fact been earned prior to receipt thereof. The trial judge appropriately charged the jury that if there was a reasonable doubt that the Petitioner had already earned the advances, then the jury must acquit. (T.R. 580). The

jury found Petitioner guilty of the conspiracy count but not guilty of either of the substantive counts. Petitioner duly filed his Motion for Acquittal which was overruled by the Trial Court on November 15, 1978. Petitioner was sentenced to five (5) years imprisonment, 120 days to be served on 40 consecutive weekends. During trial, the Government elicited testimony on direct examination of the witness ELISEO SANDOVAL that he had already pled guilty to the conspiracy count of the same indictment charging Petitioner as ELISEO SANDOVAL's co-conspirator. Counsel promptly objected and moved for mistrial. The Trial Court denied this motion and attempted to cure the attendant prejudice through an instruction to the jury.

ARGUMENT AND AUTHORITIES

I. A CONSPIRACY CONVICTION CANNOT STAND WHEN THERE HAS BEEN A DETERMINATION THAT THE OBJECT OF THE ALLEGED CONSPIRACY DOES NOT CONSTITUTE A FEDERAL CRIME.

It is fundamental that the conspiracy charge and a substantive offense made the object of a conspiracy are separate offenses, **United States v. Rabinowich**, 238 U.S. 78 (1915), and that, as a general rule any apparent inconsistency between acquittal on the substantive charge and conviction for conspiracy does not require reversal. **Dunn v. United States**, 284 U.S. 390 (1931). However, it is equally fundamental that a requisite element of any Federal conspiracy is that the object of the conspiracy must be a Federal crime. 18 U.S.C. § 371. If the substantive act made the object of the conspiracy does not constitute a Federal crime, the conspiracy conviction cannot stand -- it is a legal impossibility. **Parr**

v. United States, 363 U.S. 370 (1960); **Ventimiglia v. United States**, 242 F2d 620 (4th Cir. 1957); **Lubin v. United States**, 313 F2d 419 (9th Cir. 1963); **United States v. Galardi**, 476 F2d 1072 (9th Cir.) cert. denied, 414 U.S. 839, 856 (1973); **United States v. Thies**, 569 F2d 1268 (3rd Cir. 1978); **United States v. Binetti**, 552 F2d 1141 (5th Cir. 1977); **O'Kelley v. United States**, 116 F2d 966 (8th Cir. 1941); **United States v. Smith**, 200 F. Supp. 227 (E.D. Tenn. 1961).

The decision of the Fifth Circuit in this case is in conflict with this body of authority and should therefore be reviewed by the Supreme Court. In the present case, Petitioner was indicted on three counts, two substantive counts of misapplication of funds and one count of conspiracy. Petitioner was acquitted of both substantive counts, however, he was convicted on the conspiracy count. The only overt acts alleged in the conspiracy count, the cashing of the two checks, constituted the alleged substantive violations.

There is no dispute over the fact that the conspirators performed all the acts that they conspired to do; that is, they completed the object of their alleged conspiracy. The unique circumstance of this case that compels that conclusion is the stipulation entered into between the Defense and the Government. Upon request, the Defense stipulated that the two checks which were the subject of the indictment were, in fact, cashed. (T.R. 245) The conspiracy count alleges two overt acts, and those acts were the stipulated cashing of the two checks. Those same two acts were alleged as the substantive violations in Counts II and III.

The only fact issue presented throughout the trial was whether the funds allegedly misapplied were in fact Federal funds or whether those funds had been earned by the Defendant thereby entitling him to those monies.

The jury was thereby precluded from finding that the physical acts, the substantive acts, which were the object of the conspiracy count, did not occur. Thus, because of the unique circumstances, the case is distinguished from the general rule stated in **United States v. Rabinowich**, 238 U.S. 78 (1915):

> The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never by consummated, yet the conspiracy is nonetheless punishable.

238 U.S. at 79

Here, the conspiracy did not fail of its object.

The Trial Judge appropriately charged the jury that if there was a reasonable doubt that Petitioner had already earned the monies advanced to him, then the jury must acquit. (T.R. 580) Because of the stipulation, the jury was precluded from finding that the actual cashing of the checks did not occur. Therefore, the jury's acquittal on both substantive counts necessarily constituted a determination that the funds involved in the transaction had been earned, and therefore did not constitute Federal funds within the scope of 42 U.S.C. § 2971f(a). This conclusion was reflected by Judge Garza at the time he received the jury verdict:

> The Court: Eduardo Romeros, this jury has found you guilty of conspiring with Eliseo Sandoval to misapply funds. They have found you not guilty on

> the substantive counts of misapplication. I would imagine that the jury probably found that you conspired with Sandoval to get it when you did for illegal purposes. (T.R. 588)

In sum, the jury convicted the Defendant of conspiring to misapply his own money; an act not within the scope of any federal substantive crime, and a legal impossibility.

The authority is unanimous that where the object of the conspiracy does not constitute a federal crime, there can be no federal conspiracy conviction. In **Parr v. United States**, 363 U.S. 370 (1960), the Court reversed convictions on substantive counts under the federal mail frauds statute, determining that the use of the mails did not come within the scope of the federal law. Finding no violation of the substantive law, the Court had no difficulty reversing the conspiracy count:

> Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count I, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand.

363 U.S. at 393.

Likewise, in **United States v. Binetti**, 552 F2d 1141 (5th Cir. 1977) (petition for rehearing) the object of the conspiracy was completed but was not criminal; the defendant was convicted on counts of conspiracy and possession with intent to distribute cocaine, but the substance turned out to be Lidocaine, a non-controlled substance. The Fifth Circuit reversed the convictions;

there could be no criminal conspiracy when the actual object of the conspiracy, distrubution of Lidocaine, was not a federal crime. Conspiring to distribute a non-controlled substance is directly analogous to conspiring to misapply one's own money. If the object of the conspiracy is actually completed and does not constitute a federal crime, there can be no conspiracy conviction.

The doctrine has been applied consistently in the other circuits, as well. There can be no conspiracy to violate Taft-Hartley provisions against bribing union officials when the facts establish that the recipients were not, in fact union officials. **Ventimiglia v. United States**, 242 F2d 620 (4th Cir. 1957). A conviction for conspiracy to violate the federal bank statute cannot stand when the evidence shows the money was not bank property at the time of the theft. **Lubin v. United States**, 313 F2d 419 (9th Cir. 1963).

> We do not think that the Congress, in enacting the conspiracy statute, intended to make criminal schemes which, if successfully carried out, would not result in the commission of federal substantive offenses.

313 F2d at 422. See also: **United States v. Galardi**, 476 F2d 1072 (9th Cir.) **cert. denied**, 414 U.S. 89, 856 (1973); **United States v. Theis**, 569 F2d 1268 (3rd Cir. 1978)

The crucial link between this line of cases is a determination that the object of the conspiracy does not constitute a crime. It does not matter whether that determination is made by the trier of fact at trial, or by an appellate court in review. In **Ventimiglia**, the trial

was to the Court, and the Judge, as fact finder, made the determination that the completed conspiracy did not constitute a crime. Here, the jury made the determination.

As the Fourth Circuit established in **Ventimiglia**:

> It is, of course, beyond dispute that a punishable conspiracy may exist independent of the actual commission of the substantive offense which was the object of the conspiracy. This need not be labored. However, there can be no conviction for conspiracy to commit an offense against the United States if the act that the alleged conspirators agree to do has not been made unlawful, and is not planned to be accomplished in an unlawful manner.

242 F2d at 622

The conspiracy alleged in Count I is, by the plain wording of the indictment, a conspiracy to commit the substantive acts alleged in Counts II and III. Indeed, the overt acts alleged in the conspiracy count are the same acts alleged as substantive crimes in Counts II and III. The jury has convicted the Defendant in Count I of conspiring to commit acts which did not constitute federal crimes by their verdicts on Counts II and III. Since the requisite element of criminal objective is absent, the conspiracy conviction must be reversed.

II. GOVERNMENT SOLICITED TESTIMONY BY THE SOLE CO-CONSPIRATOR THAT HE HAD PLED GUILTY TO THE SAME CONSPIRACY COUNT AS CHARGED AGAINST PETITIONER DENIED THE PETITIONER A FAIR TRAIL

It is well established that the guilty plea of one co-defendant cannot be considered as evidence of guilt in the trial of a co-defendant. **Babb v. United States**, 218 F2d 538 (5th Cir. 1955). Although there may be special circumstances in which a co-defendant's guilty plea may be admissable, the potential prejudice is so great that each case is closely scrutinized. **United States v. Fleetwood**, 528 F2d 528 (5th Cir. 1976). The prejudice is overwhelming when testimony regarding the guilty plea is being elicited from the sole alleged co-conspirator and the indictment charges conspiracy. **United States v. Harrell**, 436 F2d 606, 614 (5th Cir. 1970).

Petitioner was convicted only on the conspiracy count. The only alleged co-conspirator was SANDOVAL. SANDOVAL was the Government's primary witness against Petitioner. SANDOVAL testified on direct examination in response to a direct question from Government counsel that he had already pled guilty. (T.R. 67) The defense attorney promptly objected, approached the bench, and moved for a mistrial (T.R. 68), which was ultimately denied, a jury instruction being given in lieu thereof (T.R. 89).

The Fifth Circuit refused to find reversible error on this point, holding that no aggravating circumstances were demonstrated. Petitioner respectfully submits that the aggravating and prejudicial circumstances in this case as set forth hereafter are extreme. Furthermore, this case presents an important question of federal law which has not been decided by this Court, and is in need of clarification.

A. WITNESS WAS THE SOLE ALLEGED CO-CONSPIRATOR.

The fact that there were only two alleged conspirators created an extremely prejudicial impact. The trial judge recognized this in considering the motion for mistrial:

> See, the trouble is in this case in particular there's only two conspirators' names, see. Just this man and this one defendant. When you have four, five or six conspirators, may be a different story, you know. But if this man has pled guilty of conspiracy, he couldn't have conspired with anybody else but this man. (T.R. 72, 73)

This was precisely the situation in **United States v. Harrell**, 436 F2d 606 (5th Cir. 1970), where the Fifth Circuit found the testimony, even though not objected to, constituted plain error:

> Nothing was said to dispel the predictably certain reasoning a juror could be expected to indulge in: if Norris **as admitted**, was guilty of conspiring with Harrell, how then could Harrell be other than guilty of conspiring with Norris? Jurors equally with others are aware that 'it takes two to tango'.

B. GOVERNMENT CANNOT CLAIM IMPEACHMENT AS PROPER PURPOSE

The Fifth Circuit has established that the evidence of a co-conspirator's guilty plea can only be elicited under "special circumstances", **United States v. Aldaco**, 564 F2d 706, 707 (5th Cir. 1977), for example, as impeachment of the trial testimony with a prior inconsistent statement. **United States v. King**, 505 F2d 602, 607 (5th Cir. 1974). No such special circumstances can be claimed here.

SANDOVAL was the primary Government witness. After the Government attorney had elicited SANDOVAL's guilty plea (T.R. 68), the Government attorney attempted to justify the evidence:

> **The Court:** I don't know what the purpose of this question was.
>
> **Mr. Berg:** If it please the Court, the purpose of the question was in the nature of impeachment of this witness (T.R. 69)
>
> . . .
>
> **Mr. Berg:** Of course, your honor, I've already asked the Court to allow me to examine him as an adverse witness.
>
> **The Court:** An I refused that, counsel.
>
> **Mr. Berg:** I understand that, your honor, and that time the only thing left available to me was to impeach him with prior inconsistent statements.
>
> **The Court:** But that's not a prior inconsistent statement. It's a matter of his pleading guilty or not guilty. (T.R. 70,71)

An examination of the record clearly establishes that SANDOVAL had proferred no testimony which would be inconsistent with a plea of guilty. Despite the prosecutor's urgings, the guilty plea testimony was not elicited for the proper evidentiary purpose of impeachment. The Government has been unable to demonstrate any legitimate evidentiary purpose for the elicitation of the co-conspirator's guilty plea either at trial or on appeal. As the Court stated in **United States v. Harrell**, 436 F2d 606 (5th Cir. 1970):

> The legitimate presumption is that the evidentiary purpose was the general one of demonstrating Harrell's guilt of the offenses for which he was on trial.

436 F2d at 614. See, **United States v. Aldaco**, 564 F2d 706 (5th Cir. 1977)

It is not enough that the Government claims the purpose in eliciting the testimony was impeachment, if in fact the record does not support that claim.

C. TESTIMONY WAS CONTRARY TO PRETRIAL ASSURANCES BY GOVERNMENT

The error is even more egregious here because at the outset of the trial, the Government had asserted categorically in response to a defense motion that no out-of-court statements would be offered that had not been made in the presence of the Defendant himself. (T.R. 9) Prior to trial, defense counsel filed a Motion to Require Government to Structure Order of Proof, based on **United States v. James**, 576 F2d 1121 (5th Cir. 1978) rehearing en banc granted. The purpose of the motion was to require that before any out-of-court statements of a co-conspirator could be introduced into evidence, the Court independently make a determination of the existence of a conspiracy.

In considering the motion before trial testimony began, the following exchange occured:

> **Mr. Jones:** . . . In all candor, I filed the motion blind because I do not know what Mr. Sandoval is going to testify to. (T.R. 9)
>
> **Mr. Berg:** Everything that we would offer, your honor,

> would have been in the presence of the Defendant himself, and according to Mr. Jones' definition of the necessity of **James** hearing just now, which would be something outside the presence of the Defendant, we wouldn't need a **James** hearing. (T.R. 9)
>
> . . .
>
> **Mr. Jones:** Well, Your Honor, if the prosecution can assure that is the case, then the motion, of course, would become moot, but I just want to apprise the Court that the whole purpose of the **James** type motion is to prevent the prosecution from getting this evidence before the jury and then trying to correct the matter with a curative instruction, and I just don't want that to happen. (T.R. 10, 11)
>
> **The Court:** If that happens, I'll grant you a mistrial. (T.R. 11)

By eliciting from SANDOVAL that he had already pled guilty, the Government was introducing testimony in direct contradiction to the representations made before the Court prior to the beginning of trial testimony. the Fifth Circuit characterized such testimony in **Harrell:**

> With respect to Harrell's guilt or innocence, Norris' plea of guilt was no more and no less than an inadmissable hearsay statement -- made long after the conspiracy had ended -- that he and Harrell had indeed conspired together as the indictment charged.

436 F2d at 614, 615

D. INSTRUCTION WAS INSUFFICIENT TO CURE PREJUDICE

The prejudicial effect of admitting Sandoval's guilty plea is underscored by the jury verdict. The Petitioner was acquitted on the two substantive counts, but convicted on the conspiracy count -- the same count to which the jury heard testimony of SANDOVAL's guilty plea. The evidence supporting all three counts of the indictment was virtually the same, except for the additional evidence on the conspiracy count of SANDOVAL's guilty plea. The conclusion that the jury considered SANDOVAL's guilty plea as evidence of Petitioner's guilt is virtually inescapable. The error was certainly not harmless beyond a reasonable doubt. **United States v. Fleetwood**, 528 F2d 528, 536 (5th Cir. 1976).

In view of all these circumstances, the instruction from the Court to the jury was inadequate to cure the prejudicial effect.

> There may be aggravated circumstances in which the strongest corrective instruction would be insufficient, as for example, **when the guilty plea of one co-defendant necessarily implicates another or others.**

United States v. Baete, 414 F2d 782, 783-784 (emphasis supplied). See, **United States v. Fleetwood**, 528 F2d 528, 536 (5th Cir. 1976)

As the Fifth Circuit noted in **United States v. Caro**, 569 F2d 411 (5th Cir. 1978), when reviewing a case in which there is an acquittal on the substantive offense and a conviction on the conspiracy count:

> We do suggest however, that such a result should engage our judicial skepticism. A critical analysis of the facts is required when such a contrariety of results does appear.

569 F2d at 418

The federal conspiracy statute has become an integral part of federal law enforcement. This petition raises important issues of federal conspiracy law which have arisen and will continue to arise in varying contexts. Petitioner respectfully submits that these issues should be resolved and clarified by this Honorable Court.

CONCLUSION

For the foregoing reasons Petitioner respectfully prays this Honorable Court grant Petition for Writ of Certiorari in order to resolve the important Federal questions raised herein.

RESPECTFULLY SUBMITTED,

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ATTORNEY FOR PETITIONER

DATED: October 29, 1979

UNITED STATES of America,
Plaintiff-Appellee,

v.

Eduardo ROMEROS,
Defendant-Appellant.

No. 78-5733.

United States Court of Appeals,
Fifth Circuit.

Aug. 13, 1979.

Defendant was convicted in the United States District Court for the Southern District of Texas at Brownsville, Reynaldo G. Garza, J., of conspiracy to misapply federal funds. Defendant appealed. The Court of Appeals held that: (1) disclosure of codefendant's guilty plea did not constitute reversible error where appropriate cautionary instruction was given to jury, where codefendant appeared in court and was subject to cross-examination, and where no aggravating circumstances were demonstrated, and (2) conspiracy and related substantive offense which is object of conspiracy are separate and distinct crimes, and acquittal on substantive count does not foreclose prosecution and conviction for related conspiracy.

Affirmed.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification
constitute no part of the opinion of the court.

APPENDIX "A"

1. Criminal Law 1169.7

Disclosure of the codefendant's guilty plea did not constitute reversible error where appropriate cautionary instruction was given to jury, where codefendant appeared in court and was subject to cross-examination, and where no aggravating circumstances were demonstrated.

2. Criminal Law 878(4)

Each count is separately considered, and if it is supported by evidence, may stand, and inconsistency between verdict and different counts of indictment does not vitiate convictions on those counts of which defendant is found guilty.

3. Conspiracy 28(2)

Conspiracy and related substantive offense which is object of conspiracy are separate and distinct crimes, and acquittal on substantive count does not foreclose prosecution and conviction for related conspiracy. 18 U.S.C.A. § 371.

4. Conspiracy 23

Essential elements of conspiracy are agreement by two or more persons to commit one or more unlawful acts and an over act by one conspirator in furtherance of conspiracy. 18 U.S.C.A. § 371.

5. Conspiracy 43(11)

Evidence sustained conviction for conspiracy to misapply federal funds, i.e., funds of Economic Development Corporation. 18 U.S.C.A. § 371; Economic Opportunity Act of 1964, § 626(a), 42 U.S.C.A.§ 2971f(a).

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

Eduardo Romeros appeals his conviction of conspiracy to misapply federal funds, 18 U.S.C.A. § 371; 42 U.S.C.A.

§ 2971f(a), claiming **first**, it was prejudicial for the Government to elicit testimony disclosing the guilty plea of a coconspirator; **second**, his acquittal on related substantive charges which were the same as the overt acts alleged in the conspiracy indictment rendered the conspiracy conviction invalid; and **third**, there was insufficient evidence to support the conviction. We affirm.

Romeros was a Certified Public Accountant approved by the Department of Labor to audit a program sponsored by the department undertaken by the Associated City County Economic Development Corporation of Edinburg, Texas. The Economic Development Corporation was a nonprofit corporation set up to obtain federal funding to implement programs beneficial to low income families. Its director, Eliseo Sandoval, and defendant agreed to pool a sum of money to start a consulting firm. Because Sandoval did not have his share of the start-up money for the business, he authorized defendant to cash two checks totaling $14,000 which were drawn on the account of the Economic Develop-

ment Corporation. In return defendant lent Sandoval some of the money obtained from the checks, for use in conection with the joint business venture. At the time Romeros was indicated, neither advance from the account of the corporation had been reconciled.

[1] Eliseo Sandoval was the principal witness for the Government. Defendant contends he was denied a fair trial because the Government elicited from Sandoval that he had pled guilty to the same conspiracy count for which defendant was on trial. The disclosure of the co-defendant's guilty plea did not constitute a reversible error since an appropriate cautionary instruction was given to the jury, the codefendant appeared in court and was subject to cross-examination, and no aggravating circumstances were demonstrated. **See United States v. Veltre**, 591 F.2d 347, 349-350 (5th Cir. 1979).

[2] Defendant contends that the conspiracy conviction cannot stand because there was an acquittal of the two related substantive charges. He argues that the object of the conspiracy was thus determined not to be a federal crime. If the substantive act made the object of the conspiracy does not constitute a federal crime, he argues, then there was no illegal conspiracy under 18 U.S.C.A. § 371. He cites: **Parr v. United States**, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960); **Ventimiglia v. United States**, 242 F.2d 620 (4th Cir. 1957); **Lubin v. United States**, 313 F.2d 419 (9th Cir. 1963); **United States v. Galardi**, 476 F.2d 1072 (9th Cir.), **cert. denied**, 414 U.S. 839, 856, 94 S.Ct. 90, 38 L.Ed.2d 75 (1973); **United States v. Thies**, 569 F.2d 1268 (3rd Cir. 1978); **United States v. Binetti**, 552 F.2d 1141 (5th Cir. 1977); **O'Kelley v. United States**, 116 F.2d 966 (8th Cir. 1941); **United States v. Smith**, 200 F. Supp. 227 (E.D. Tenn. 1961). Defendant misconstrues the effect of inconsistent jury verdicts.

Inconsistency between verdicts on different counts of the indictment does not vitiate convictions on those counts of which appellant is found guilty. Each count is separately considered and, if it is supported by the evidence, may stand. **United States v. Dunn**, 284 U.S. 390, 393-394, 52 S.Ct. 189, 76 L.Ed. 356 (1931); **United States v. Dudley**, 581 F.2d 1193, 1199 (5th Cir. 1978); **United States v. Gipson**, 553 F.2d 453, 457 (5th Cir. 1977).

[3] Conspiracy and the related substantive offense which is the object of the conspiracy are separate and

distinct crimes. **Iannelli v. United States**, 420 U.S. 770, 777-778, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); **United States v. Ragano**, 520 F.2d 1191, 1198 (5th Cir. 1975), **cert. denied** 427 U.S. 905, 96 S.Ct. 3192, 49 L.Ed.2d 1199 (1976). It is well established that acquittal on the substantive count does not foreclose prosecution and conviction for a related conspiracy. **United States v. Veltre, supra** at 349; **United States v. Dunbar**, 591 F.2d 1190, 1192 (5th Cir. 1979).

[4, 5] Defendant's final argument is that the evidence adduced by the Government regarding defendant's specific intent to misapply federal funds was insufficient. The essential elements of a conspiracy are an agreement by two or more persons to commit one or more unlawful acts and an over act by one of the conspirators in furtherance of the conspiracy. **United States v. White**, 569 F.2d 263, 266 (5th Cir. 1978). On appeal the Government is entitled to all reasonable inferences favorable to the verdict. **Glasser v. United States**, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

In the instant case codefendant Sandoval testified he had conspired to pay defendant advances and that he accompanied defendant to the bank to cash one of the checks. In addition, Sandoval testified that defendant gave him proceeds from the checks as a loan to fund their planned consulting firm. This record demonstrates the evidence was sufficient to support the jury verdict convicting defendant of conspiracy to misapply federal funds.

AFFIRMED.

Adm. Office, U.S. Courts—
West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-5733

D. C. Docket No. CR-B-78-270

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO ROMEROS,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas
Before WISDOM, AINSWORTH and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by cousel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

August 13, 1979

APPENDIX "B"

ISSUED AS MANDATE:

Supreme Court, U. S.
FILED
FEB 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-889

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDUARDO ROMEROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 600 F. 2d 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 13, 1979. A petition for rehearing was denied on October 4, 1979, and the petition for a writ of certiorari was filed on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiracy was rendered invalid by his acquittal of the substantive offenses that were the object of the conspiracy.

2. Whether the district court should have granted a mistrial after the government elicited testimony disclosing the guilty plea of a co-conspirator.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to misapply funds that were the subject of a federal grant, in violation of 18 U.S.C. 371. He was acquitted on two substantive counts charging that he misapplied the funds in violation of 42 U.S.C. 2971f(a). He was sentenced to five years' imprisonment, 120 days of which were to be served on 40 consecutive weekends. The balance of the sentence was suspended for three years, during which time petitioner was placed on probation (Tr. 623-624). The court of appeals affirmed (Pet. App. A).

The evidence at trial revealed that petitioner, a certified public accountant, was retained to audit programs sponsored by the Associated City County Economic Development Corporation of Edinburg, Texas, a non-profit corporation formed to obtain federal funds to implement programs to assist the poor (Tr. 27, 30-32). Its director, Eliseo Sandoval, became a close acquaintance of petitioner, and in 1976 the two men decided to form a general consulting firm to be called Universal Consultants (Tr. 34-37).

Because Sandoval lacked the resources to finance his share of the start-up money for the new business, petitioner agreed to lend him the necessary amount (Tr. 39). Petitioner subsequently submitted an invoice to the Development Corporation dated March 29, 1976, requesting an advance in the amount of $6,500 for his auditing work. Petitioner had not previously requested

an advance for services not yet performed (Tr. 59). Sandoval approved the request and authorized issuance of a check in payment of the invoice (Tr. 40-43). When petitioner received the check, Sandoval accompanied him to the bank. After petitioner cashed the check, he loaned Sandoval $1,600 from the proceeds to be deposited into the account of Universal Consultants. Contrary to normal practice, the rest of the money was not deposited into petitioner's business account (Tr. 41-44, 59). The $6,500 advance to petitioner was never deducted from an amount due on invoices submitted for work subsequently completed by petitioner (Tr. 44, 64-65, 90-99). Although Sandoval could have deducted the advance from payments on subsequent invoices submitted by petitioner, he did not do so, in part because of the money petitioner loaned him for his share of the start-up money for Universal Consultants (Tr. 91-92).

On August 11, 1976, Sandoval approved another requested advance to petitioner, in the amount of $7,500, again in part because of his indebtedness to petitioner for the $1,600 loan (Tr. 91-100, 102, 106). As of the trial date, neither advance had been deducted from petitioner's requests for payments for audits he conducted (Tr. 108-109).

2. During direct examination of Sandoval, the prosecutor asked permission to examine him as a hostile witness because he was not being as candid in his testimony as he had been in his interview with the prosecutor (Tr. 66). Although the trial court denied the request, it suggested that the government impeach the witness with a prior written statement (Tr. 66-67).

Thereupon, the government resumed questioning as follows (Tr. 67):

GOVERNMENT: Now, Mr. Sandoval you are named in Counts one, two, and three of this indictment as a defendant yourself, are you not?

SANDOVAL: Yes, sir.

GOVERNMENT: And what position have you taken with regards to Count one of the indictment?

SANDOVAL: I pleaded guilty to one of those counts, sir.

Petitioner's counsel immediately objected and moved for a mistrial. The prosecutor explained to the court that he brought out the guilty plea because Sandoval indicated in his testimony that he had not conspired with anyone (Tr. 69, 70-71). The prosecutor stated that his purpose was to probe into prior inconsistent statements Sandoval made at the time of his guilty plea (Tr. 70-71, 75-76). The trial court denied the mistrial request (Tr. 80), concluding that statements made at the time of the guilty plea could be used to impeach inconsistent trial testimony (Tr. 75-76, 79-80, 82) and that, in any event, any resulting prejudice could be cured by an appropriate cautionary instruction to the jury (Tr. 77-79). But the court nevertheless determined that in this case the prosecutor should not question Sandoval regarding any prior inconsistent statements made at the time the plea was entered.

The court then instructed the jury as follows (Tr. 89-90):

> Members of the jury, I just want to tell you before we recessed the United States Attorney asked Mr. Sandoval if he was a co-defendant in this case, and

> he said yes. And he asked him if you have pled guilty, and he said, "I pled guilty to one of these counts."
>
> And I want to instruct you that the fact that a co-defendant and a co-conspirator has pled guilty is no evidence of this man's guilt here. The fact that he has pled guilty is no evidence, and you are not to consider the fact that this man has pled guilty in any way regarding the guilt or innocence of Mr. Romeros.

And again, in its closing instructions to the jury, the court stated (Tr. 582):

> The fact that Eliseo Sandoval has come before you and said I plead guilty and I think that I willfully misapplied these funds doesn't make this man guilty. Because every defendant has a right to have his case tried on what he himself said or did. And it is not a question of whether Sandoval feels that he is guilty or not guilty. It's a question of you deciding whether this man had the specific intent to misapply these funds as I have defined that term to you.

ARGUMENT

1. Petitioner argues (Pet. 5-10) that his acquittal on the substantive counts of violating 42 U.S.C. 2971f(a), based on the two advances which were the object of the conspiracy, constitutes a finding that he had earned the monies advanced and that they were not, therefore, federal funds which could have been misapplied within the meaning of the statute. Petitioner further contends that this finding is a judicial determination that the object of the conspiracy was not a federal crime and that his conviction on the conspiracy count therefore cannot stand.

However, as petitioner concedes (Pet. 5), it is well settled that each count in the indictment is to be separately considered and that an acquittal on one count will not vitiate a conviction on another count that is supported by the evidence, even if the verdicts are inconsistent. *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). The conspiracy and the substantive offense charged in the indictment are separate crimes, *Iannelli* v. *United States*, 420 U.S. 770, 777-778 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961), and a jury verdict of not guilty on the substantive counts based on transactions which were the object of the conspiracy does not bar a guilty verdict on the conspiracy count if it is supported by sufficient evidence. See, *e.g.*, *United States* v. *Veltre*, 591 F. 2d 347 (5th Cir. 1979).

In this case, the evidence was sufficient to support petitioner's conspiracy conviction, and the verdicts were not in fact necessarily inconsistent. Sandoval consented to and did advance petitioner federal funds and postponed deducting the advances from any future invoices in return for a loan from petitoner. This loan was consummated when Sandoval accompanied petitioner to the bank, where petitioner cashed the first advance and gave $1,600 to Sandoval, who then deposited the money in the Universal Consultants account. The jury could have concluded that Sandoval, rather than petitioner, had been responsible for any violation of 42 U.S.C. 2971f(a), because Sandoval had custody of the funds and (the jury could have believed) had already misappropriated them when petitioner received them. Alternatively, the jury could have engaged in jury nullification, choosing to convict petitioner only of conspiracy. Such nullification is not a basis for setting

aside the conviction on the remaining count. *Dunn* v. *United States, supra*, 284 U.S. at 393. There is also no basis for setting aside a conviction on the basis of speculation that the verdict may have been the result of compromise or mistake. *Id.* at 394.

The cases relied upon by petitioner (Pet. 5-6) are inapposite. In those cases, the court concluded that the prosecution had failed to introduce evidence of an essential element of the substantive offense charged or that the object of the conspiracy did not, as a matter of law, constitute an offense against the United States and that the defendants could therefore not be convicted under 18 U.S.C. 371 of a conspiracy "to commit any offense against the United States." See *Parr* v. *United States*, 363 U.S. 370, 393 (1960); *United States* v. *Thies*, 569 F. 2d 1268 (3d Cir. 1978); *United States* v. *Binetti*, 552 F. 2d 1141 (5th Cir. 1977); *United States* v. *Galardi*, 476 F. 2d 1072, 1079 (9th Cir.), cert. denied, 414 U.S. 839 (1973); *Ventimiglia* v. *United States*, 242 F. 2d 620 (4th Cir. 1957); *Lubin* v. *United States*, 313 F. 2d 419 (9th Cir. 1963); *United States* v. *Smith*, 200 F. Supp. 227 (E.D. Tenn. 1961). The result in these cases did not turn, therefore, upon any supposed inconsistency in jury verdicts. Here, the alleged misapplication of funds clearly constitutes an offense under 42 U.S.C. 2971f(a), and the evidence was sufficient to support a guilty verdict on Counts II and III alleging a violation of that statute, even though the jury did not return such a verdict.[1]

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[1]Moreover, contrary to petitioner's contention, the object of a conspiracy under 18 U.S.C. 371 need not always be a federal offense. That section embraces situations where "two or more persons conspire *either* to commit an offense against the United States, *or* to defraud the United States * * *." See, *e.g.*, *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966). Count I of the

2. Petitioner also contends (Pet. 10-16) that the trial court erred in refusing to grant a mistrial after the prosecutor elicited the fact that Sandoval pleaded guilty to one of the counts charged in the indictment. However, as the court of appeals held, "disclosure of the co-defendant's guilty plea did not constitute a reversible error since an appropriate cautionary instruction was given to the jury, the co-defendant appeared in court and was subject to cross-examination, and no aggravating circumstances were demonstrated" (Pet. App. 22, citing *United States* v. *Veltre*, *supra*, 591 F. 2d at 349-350). See also *United States* v. *King*, 505 F. 2d 602, 607-608 (5th Cir. 1974); *United States* v. *Newman*, 490 F. 2d 139 (3d Cir. 1974).

The prosecutor stated that he initiated the questioning regarding the guilty plea because he intended to use prior inconsistent statements made at the time of acceptance of the guilty plea to impeach certain of Sandoval's testimony at trial that suggested the absence of a conspiracy (Tr. 69, 70-71). The trial court credited this explanation and essentially agreed with the prosecutor's legal argument that such statements would be admissible (Tr. 75-76, 79-80, 82). Thus, the question pertaining to the guilty plea was apparently intended to put any

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indictment in the present case charged a conspiracy "to defraud the United States and a department and agency thereof, by wilfully and knowingly misapplying funds and causing to be misapplied, monies and funds * * * in violation of Section 371, Title 18 and Section 2971f(a), Title 42, United States Code." Thus, although the jury instructions did not address this point, it is conceivable that the jury could have acquitted petitioner on the substantive counts of violating 42 U.S.C. 2971f(a), finding that one or more of the essential elements of that offense were not proven beyond a reasonable doubt, but still have found a conspiracy to defraud the United States through a noncriminal misapplication of funds.

questions about prior inconsistent statements in context. This is therefore not a case in which the prosecutor sought to introduce the fact of a co-conspirator's guilty plea solely as direct evidence of the defendant's guilt. No emphasis was placed on the guilty plea at the time it was mentioned, the court did not allow any more questioning pertaining to the plea or statements made at the time it was entered (despite the court's ruling that such statements would be admissible), and the trial court gave cautionary instructions to the jury immediately after the guilty plea was mentioned and again before submitting the case to the jury.

Moreover, as the prosecutor pointed out to the court during the conference on petitioner's motion for a mistrial (Tr. 86-87), the jury was probably already aware that Sandoval had pleaded guilty. Petitioner's counsel had requested that the following question be asked of the jurors during voir dire: "Does any member of the jury panel feel that because one alleged accomplice and/or alleged co-conspirator has plead[ed] guilty that the other alleged accomplice and/or alleged co-conspirator must therefore also be guilty?" (I-R. 32). As the district court pointed out (Tr. 86-87), the indictment—which indicated that there were but two alleged conspirators (Sandoval and petitioner)—was also read to the jury. Thus, the jury would likely have concluded that the voir dire question pertained to Sandoval.

The Fifth Circuit cases relied upon by petitioner do not support his position. In *United States* v. *Aldaco*, 564 F. 2d 706 (5th Cir. 1977), for example, the court of appeals found that the prosecution's sole purpose for calling the witness was to elicit testimony about the guilty plea, and in *United States* v. *Fleetwood*, 528 F. 2d

528, 533, 536 (5th Cir. 1976), and *United States* v. *Harrell*, 436 F. 2d 606, 614-617 (5th Cir. 1970), the court found aggravating circumstances because the fact of the guilty plea was emphasized at trial. Even more significantly for present purposes, however, the trial court had failed in all three cases to give a cautionary instruction.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

FEBRUARY 1980

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[2]Contrary to petitioner's argument (Pet. 14-15), Sandoval's testimony was not in violation of pretrial assurances offered by the prosecutor or the Fifth Circuit's en banc decision in *United States* v. *James*, 590 F. 2d 575, cert. denied, No. 78-1412 (June 4, 1979). The agreement (Tr. 10-11) and decision both pertain to the use of statements made by a co-conspirator in furtherance of the conspiracy as substantive evidence of guilt under the traditional exception to the hearsay rule. They do not concern the possible use of prior inconsistent statements to impeach testimony at trial.